IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24543-8-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
A.M.,	)	**UNPUBLISHED OPINION**
	)	
Respondent.	)	
	)	

BROWN, J.—The State of Washington appeals the trial court's ruling excluding evidence and dismissing firearm and stolen firearm possession charges against A.M., a juvenile. The two-sentence findings do not support the court's legal conclusion. Because reasonable articulable suspicion is the standard to justify a *Terry*[1] investigatory stop, not actual knowledge of a crime reported or crime in progress, we reverse.

FACTS

The facts are summarized from the suppression hearing record consisting solely of the testimony from two law officers relating the circumstances of a reported

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

investigatory stop. As explained below, the formal findings consist of two brief paragraphs. The first paragraph is conclusory and uncontested, dealing with the seizure point. The second paragraph of two short sentences is inadequate to understand the relevant facts.

During his July 9, 2005 in-briefing, Spokane Police Officer Karl Thompson was informed about an on-going investigation related to a large street-gang fight the evening before and told to expect retaliation. A Crip gang associate was seriously injured in a stabbing at the home of a rival street-gang associate. The home and nearby cars had been damaged. Officer Thompson learned A.M., a person he knew as a Crip gang associate, had been present at the fight scene. As a result of his briefing, Officer Thompson patrolled the fight area and confirmed with a contact there his in-briefing information that Crip retaliation was expected.

At 8:00 p.m., Officer Thompson saw A.M. in a group, including other persons he knew from his experience were associated with the Crip gang assembled within 50 yards of the fight scene. Officer Thompson, with 28 years of experience, including school resource officer and working with gang members, stopped to investigate what he considered suspicious circumstances consistent with his in-briefing. He found nine people in and around a car located around the corner from the fight scene. Officer Thompson advised the group to keep their hands visible, recalled two persons who attempted to depart, and called for back up. A.M. did not comply with the order to keep his hands visible, and acted suspiciously by moving his hand into his pocket and

fidgeting with his waistband, which was covered by his shirt-tail. A.M. failed to respond when asked if he was present at the fight scene the night before.

Officer Kevin Vaughn arrived within two to three minutes as back up and heard Officer Thompson telling the individuals to keep their hands in view. Officer Vaughn also knew A.M. from past contacts and described the dangerousness of the particular Crip gang A.M. was associated with. Officer Vaughn described A.M. as repeatedly and nervously fidgeting with his waistband and putting his hands in his pocket. Out of concern for officer and community safety, Officer Vaughn decided to pat down A.M. While guiding A.M. to a grassy area he heard Officer Thompson ask if anyone was armed "because we're going to search you." Report of Proceedings (RP) at 15. A.M. admitted he had a "piece" (a gun) and then, Officer Vaughn put A.M. on the ground and recovered a .380 pistol from A.M.'s waistband. The pistol had been stolen.

A.M. was charged with second degree unlawful possession of a firearm and possession of a stolen firearm. A.M. filed a CrR 3.6 motion to suppress the gun. The court granted the motion after the hearing, concluding:

> The officer did not have specific and articulable facts sufficient to support a reasonable suspicion that [A.M.] or the others present had committed a crime, or were involved in criminal activity. Because the initial seizure of [A.M.] was unlawful, the subsequent search and fruits of that search are inadmissible.

Clerk's Papers (CP) at 44. The State appealed.

ANALYSIS

The issue is whether under the facts the trial court erred in concluding Officer Thompson lacked reasonable suspicion for an investigatory *Terry* stop. The sole finding bearing on the above conclusion provides: "The officers did not observe any criminal activity by [A.M.] or the others present. The officers did not have specific reports of any criminal activity in progress." CP at 44.

We review CrR 3.6 suppression orders by independently evaluating the evidence to determine if substantial evidence supports the findings and the findings support the conclusions. *State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994). "[W]here the findings are unchallenged, they are verities on appeal." *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (citing *Hill*, 123 Wn.2d at 644). We review suppression hearing conclusions de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Here, the findings do not support the conclusions.

As noted above, the court's first finding was actually a conclusion related to the seizure point. Whether someone is seized is a conclusion of law, not a finding of fact. *State v. Rankin*, 151 Wn.2d 689, 721, 92 P.3d 202 (2004). The State does not contest the investigative seizure point as the initial stop. The court's sole factual finding focuses on actual knowledge of criminal activity. However under *Terry*, suspicion is the test, not an actual crime in progress or an actual crime report. Because the trial court applied the wrong legal standard, actual knowledge, and the findings do not support the conclusion, the State's decision not to challenge the findings does not preclude review.

Warrantless searches are per se unreasonable unless within an established and well-delineated warrant exception. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Exceptions include a *Terry* investigative stop. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). The State carries the burden of showing that the particular search or seizure in question falls within the exception asserted. *Id.* at 172.

In *Terry*, the United States Supreme Court held if an initial stop is justified a police officer may make a reasonable search for weapons without violating the Fourth Amendment, regardless of whether he has probable cause to arrest the individual, if the circumstances lead the officer to reasonably believe that his safety or the safety of others is at risk. *See Terry*, 392 U.S. at 20-27. "The Washington constitution affords greater privacy protection than the Fourth Amendment." *Id.* at 177.

In Washington, the State must show "(1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes." *Duncan*, 146 Wn.2d at 172. (citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). "To justify a seizure on less than probable cause, *Terry* requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*." *Duncan*, 146 Wn.2d at 172 (citing *Terry*, 392 U.S. at 21).

"Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances

are suspicious." *O'Neill*, 148 Wn.2d at 576. If a police officer's conduct or show of authority, objectively viewed, rises to the level of a seizure, that seizure is valid only where "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant'" the detention of the person. *Id.* (quoting *Terry*, 392 U.S. at 21). The officer's reasonable suspicions are, therefore, relevant once a seizure occurs, and relate to the question whether the seizure is valid under article I, section 7 of the Washington State Constitution. Because the trial court applied an actual knowledge standard, it erred in suppressing the evidence and dismissing the charges against A.M.

Both Division One and Division Two of this court have addressed similar, but distinguishable, facts. In *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988), Division One held an officer's detention of a suspect and his companion based merely on the late hour and presence in a high crime area did not give officers specific and articulable facts that justified an investigatory stop. In *State v. Crane*, 105 Wn. App. 301, 312-13, 19 P.3d 1100 (2001), Division Two held an officer did not have reasonable suspicion to detain a suspect who merely arrived at a house at 4:30 a.m. with a legitimate purpose and began to enter the house at a time when police were in the process of getting a warrant to search the house.

Here, Officer Thompson was faced with the kind of suspicious circumstances envisioned in *O'Neill*. He was briefed about an on-going investigation concerning a gang fight the previous night resulting in serious injuries to a Crip gang associate and

property damage. Officer Thompson related his 28 years' experience and specialized knowledge of gang activities, and the particular Crip gang involved here. Less than 50 yards from a rival gang associate's home, the scene of an on-going investigation of the previous night's fight, Officer Thompson saw A.M., a known Crip gang associate with other Crip gang associates in a group. Considering his in-briefing, and his street contact confirming expected retaliation, the time, place and circumstances aroused Officer Thompson's suspicions of imminent gang retaliation.

The State does not contest that the seizure point for this investigatory stop occurred when Officer Thompson pulled up and took control of the group.

Officer Thompson's initial contact with A.M. increased his suspicions and his personal and community safety concerns. A.M. was at the fight the night before, but when asked whether he was at the fight, A.M. did not respond. Officer Thompson asked A.M. to keep his hands in view and not in his pockets, but A.M. continued to fidget with his waistband. A.M.'s waist was concealed by his shirt-tail. He appeared nervous. Officer Thompson called for back up because of his safety concerns. Officer Vaughn described the same fidgety behavior suggesting concealment of a weapon. For officer and community safety, Officer Vaughn decided to frisk A.M. Prior to the frisk, A.M. admitted he had a gun that Officer Vaughn found in his waistband.

In sum, Officer Thompson had a reasonable, articulable suspicion, based on specific, objective facts, that A.M. was about to commit a crime. The trial court incorrectly interpreted *Terry* to require actual knowledge. The focus of the *Terry* stop is

reasonable suspicion. The ensuing safety concerns justified the subsequent frisk. The trial court erred in suppressing the evidence and dismissing the case.

Reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kato, J.

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Kulik, J.